Supreme Court, U.S.
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92-1308
No. _____

In The

Supreme Court of the United States

October Term, 1992

KARIN APARO,

Cross-Petitioner

v.

STATE OF CONNECTICUT,

Cross-Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

CROSS PETITION
(WITH ATTACHED APPENDICES)

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether Principles Of Double Jeopardy And Due Process Preclude A Retrial When At The First Trial For Conspiracy To Commit Murder, The Cross-Petitioner Secured Seven Not Guilty Votes Which Is More Than She Will Be Required To Secure For Acquittal At Her Retrial For The Same Crime?**

II. **Whether The Connecticut Supreme Court's Application Of Collateral Estoppel To The Facts Of This Case Was In Accord With Established Federal Decisions Since It Applied Collateral Estoppel In A Hypertechnical And Archaic Manner Rather Than With Realism And Rationality?**

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The Cross-Petitioner, Karin Aparo, respectfully requests that this Court grant a writ of certiorari seeking review of the Connecticut Supreme Court's decision in *State of Connecticut v. Karin Aparo*, 223 Conn. 384, 614 A.2d 401 (1992) (*see* Petitioner's Appendix, 1A-28A, hereinafter "Pet. App. __").

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 223 Conn. 384, 614 A.2d 401 (1992) and is reprinted in Petitioner's Appendix at 1A-28A.

JURISDICTION

The judgment and opinion of the Connecticut Supreme Court were entered on August 11, 1992. The motions of the parties for reargument and/or reconsideration were denied on September 17, 1992.

The cross-petitioner is relying upon Rule 12.3 of the Rules of the Supreme Court of the United States in filing this cross-petition. The cross-petitioner received the petition for a writ of certiorari in connection with which the cross petition is filed on December 16, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The challenged decision is a final judgment within the meaning of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 53a-8:

§ 53a-8. Criminal liability for acts of another

A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Connecticut General Statutes Section 53a-48(a):

§ 53a-48. Conspiracy.

(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes Section 53a-54a(a):

§ 53a-54a. Murder defined...Classification

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person...

Connecticut General Statutes Section 54-82b(c):

§ 54-82b. Right to trial by jury

(c) In any criminal trial by a jury, except as otherwise provided by law, such trial shall be by a jury of six.

Connecticut General Statutes Section 54-82(c):

§ 54-82(c).

If the party accused does not elect to be tried by the court, he shall be tried by a jury of six except that no person, charged with an offense which is punishable by death or life imprisonment, shall be tried by a jury of less than twelve without his consent.

STATEMENT OF THE CASE

The cross-petitioner, Karin Aparo, who was sixteen at the time of her arrest, was charged with one count of murder as an accessory in violation of Connecticut General Statutes §§ 53a-54a(a) and 53a-8, and one count of conspiracy to commit murder in violation of Connecticut General Statutes §§ 53a-48(a) and 53a-54a(a). *State v. Aparo*, 223 Conn. 384, 385-6 (1992) (Pet. App. 2A-3A).

The conspiracy count as charged was unique in that the State charged the crime of conspiracy in two subsections with the time frame being the only difference between them. Subsection (a) alleged a conspiracy that began in the summer of 1986 when the cross-petitioner was fifteen years old and ended on August 5, 1987 when the she was sixteen; while subsection (b) alleged the same time frame as alleged in the substantive murder count; that is, a conspiracy for an approximately two-week time period directly prior to the murder when the respondent was sixteen years old.[1]

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[1] The conspiracy count charged two subcounts as follows:

a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and

b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be

The cross-petitioner moved to sever the murder and conspiracy counts on the ground, *inter alia*, that she was entitled to a jury of twelve on the murder count in accordance with Connecticut General Statutes § 54-82b(c) and to a jury of six on the conspiracy count in accordance with Connecticut General Statutes § 54-82(c). *Aparo*, 223 Conn. at 387 (Pet. App. 4A). She supplemented her motion by arguing in the alternative that if the court denied the motion to sever the counts, two juries should be empaneled, one of twelve juries for the murder count and one of six jurors for the conspiracy count. *Id.* The trial court denied the motion. *Id.*

After a lengthy trial, a jury of twelve acquitted her of the accessory charge but could not reach a verdict on the conspiracy charge. *Id.*, at 386 (Pet. App. 3A). The vote on the mistried count was seven to five for acquittal. *Id.*, at 387 (Pet. App. 4A). After the trial court declared a mistrial on the conspiracy count, the state announced its intention to retry the cross-petitioner on that count. *Id.*, at 386 (Pet. App. at 3A).

The cross-petitioner filed a motion to dismiss all pending charges based upon principles of double jeopardy and collateral estoppel. Upon the trial court's denial of this motion, the cross-petitioner took an interlocutory appeal, raising three issues: (1) principles of double jeopardy

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performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

See Respondent's Appendix 2A.

preclude retrial when six out of twelve jurors vote for acquittal; (2) principles of collateral estoppel preclude retrial because the jury necessarily found that she had never intended that her mother be killed; and (3) principles of collateral estoppel require the exclusion of certain evidence, leaving insufficient admissible evidence to warrant a retrial. *Id.*

The Connecticut Supreme Court rejected the first and second of these claims, but it accepted the third claim in part. *Id.*, at 387 (Pet. App. at 4A).

The cross-petitioner challenges the Connecticut Supreme Court's decision on two grounds: (1) double jeopardy precludes a retrial where the cross-petitioner has already obtained the necessary number of not guilty votes at the first trial; and, (2) that if the Connecticut Supreme Court had applied the doctrine of collateral estoppel in accordance with established principles, it would have found that the first jury necessarily determined an essential element of the conspiracy count in her favor, and therefore, the retrial is barred.

The Connecticut Supreme Court rejected the cross-petitioner's argument that by its verdict of acquittal on the murder count, the jury had necessarily determined an essential element of the conspiracy count in her favor. In affirming the trial court's decision that collateral estoppel did not act as a complete bar to retrial, the Connecticut Supreme Court provided a detailed summary of evidence in its opinion. *See Aparo*, 223 Conn. at 393-401 (Pet. App. 10A-18A).

The court rejected the cross-petitioner's claim that because it was undisputed that she aided Coleman by telling him that the victim was home alone, the verdict of acquittal demonstrated that she did not have the intent to kill her mother. *Id.*, at 402 (Pet. App. 19A). The court reasoned that the jury could have found that while the cross-petitioner told Coleman that her mother was home alone, and while she may have wanted her mother to be killed, she did not impart this information with the intention that it result in her mother's death. *Id.*, at 403 (Pet. App. 20A). The court determined that her statement to Coleman that her mother was home alone was an innocent statement and that it was uttered without intending to aid Coleman in the commission of the murder. *Id.* Consequently, the court concluded that "[t]he jury's conclusion that there was a reasonable doubt as to whether the defendant had solicited, requested, commanded, importuned, or intentionally aided Coleman would, therefore, not be inconsistent with the conclusion that the defendant had entered into a conspiracy to commit murder." *Id.*, at 404 (Pet. App. 21A).

The court also rejected the cross-petitioner's claim that even if the jury determined that she had the specific intent to murder but that she did not do any of the acts alleged and charged by the court, the principle of collateral estoppel would still bar a retrial based upon the trial court's jury charge because the trial court incorrectly added the element of "intent to join" to the accessory statute, which collapsed the distinction between the accessory statute and the conspiracy statute. *Id.*, at 401 n.6 (Pet. App. 18A).

On the accessory charge, the trial court instructed the jury that it had to find that "she intended to aid, assist or

join Dennis Coleman in the commission of the murder of her mother." *Id.* The cross-petitioner had argued that because the ordinary meaning of "join" is "agree," and because agreement is the only element of conspiracy that will be at issue at the retrial, the jury necessarily found that she did not conspire with Coleman. *Id.* The Connecticut Supreme Court believed that the trial court's instruction "clearly separate[d] the question of the defendant's intent to join Coleman from that of whether she solicited, requested, commanded, importuned, or intentionally aided Coleman to commit murder. The jury was not told that its resolution of the former question would answer the latter as well." *Id.*, at 402 n.6 (Pet. App. 19A).

The Connecticut Supreme Court also rejected the cross-petitioner's claim that because she obtained seven votes for acquittal on the conspiracy count -- more than the necessary number that she will have to obtain on a retrial -- double jeopardy protects her against a second prosecution. *Id.*, at 387-8 (Pet. App. 4A-5A).

The court examined the relevant statutory provisions[2] and concluded that had the cross-petitioner preferred a jury of six at her first trial, she could have so elected. Additionally, it determined that a valid jury verdict in a criminal case must be unanimous, and since the jury did not render a unanimous finding, the vote tally is legally irrelevant and double jeopardy is inapplicable. *Id.*, at 388 (Pet. App. 5A).

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[2] Connecticut General Statutes § 54-82b(c) provides: "In any criminal trial by a jury, except as otherwise provided by law, such trial shall be by a jury of six." Connecticut General Statutes § 54-82(c) provides: "If the party accused does not elect to be tried by the court, he shall be tried by a jury of six except that no person, charged with an offense which is punishable by death or life imprisonment, shall be tried by a jury of less than twelve without his consent."

REASONS FOR GRANTING THE WRIT

I. Principles Of Double Jeopardy And Due Process Preclude A Retrial On The Conspiracy Count When Seven Out Of Twelve Jurors Voted For Acquittal On That Count In The First Trial And She Is Entitled To Only A Jury Of Six At The Retrial.

Pursuant to the double jeopardy clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution, a retrial to a jury of six on the conspiracy count is barred since the cross-petitioner already secured the number of votes for acquittal at the first trial that she will need in order to be acquitted at a retrial.

At the first trial, the cross-petitioner was tried to a jury of twelve pursuant to Conn. Gen. Stat. § 54-82(c)[3] since she was charged with murder, a crime punishable by life imprisonment. The vote on the conspiracy count was seven to five for acquittal. *State v. Aparo*, 223 Conn. 384, 387 (1992). At the retrial, the cross-petitioner is only entitled to a jury of six on the conspiracy charge pursuant to Conn.

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[3] Conn. Gen. Stat. § 54-82(c) provides in part: "If the party accused does not elect to be tried by the court, he shall be tried by a jury of six except that no person, charged with an offense which is punishable by death or life imprisonment, shall be tried by a jury of less than twelve without his consent."

Gen. Stat. § 54-82b(c) because conspiracy to commit murder is not punishable by life imprisonment.[4]

The securing of seven not guilty votes on the conspiracy count was an acquittal for double jeopardy purposes[5] because it was a resolution of the factual elements of the conspiracy count in the cross-petitioner's favor by at least six jurors, *see United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), the same number she must secure at a retrial.

The Connecticut Supreme Court rejected this claim on the ground that a valid jury verdict in a criminal case must be unanimous, and since the jury did not render a unanimous finding, the vote tally is legally irrelevant. *Aparo*, 223 Conn. at 388 (Pet. App. 5A). However, this conclusion ignores established law that an acquittal can result from something other than a unanimous jury verdict. For example, in *Martin Linen Supply Co.*, this Court stated that in order for a result to be labeled an acquittal, it must "represent[] a resolution of some or all of the factual elements of the offense charged." 430 U.S. at 571. In *Martin Linen Supply Co.*, after the trial court discharged

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[4] Conn. Gen. Stat. § 54-82b(c) provides in part: "In any criminal trial by a jury, except as otherwise provided by law, such trial shall be by a jury of six."

[5] The double jeopardy clause emodies three protections: it protects against a second prosecution of the same offense after acquittal; it protects against a second prosecution for the same offense after convistion; and it protects agsinst multiple punishments for the same offense. *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 2090 (1990).

the jury when it was unable to agree on a verdict, it granted the defendant's motion for acquittal on the ground that the Government had not proved facts constituting the crime charged. *Id.* at 565-72. Therefore, an acquittal for double jeopardy purposes can arise from a situation other than when a jury returns a unanimous verdict.

In the case at bar, it was a *de facto* acquittal when the cross-petitioner obtained seven votes for acquittal -- more than the number she will be required to obtain at the retrial on the same count. Accordingly, the cross-petitioner cannot be constitutionally retried by a jury of six on the same count for which she already secured seven votes for acquittal, and therefore, double jeopardy precludes a retrial before a jury of six on this count.

II. The Connecticut Supreme Court's Application Of Collateral Estoppel To The Facts Of This Case Was Not In Accord With Established Federal Decisions Since It Applied Collateral Estoppel In A Hypertechnical And Archaic Manner Rather Than With Realism And Rationality.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court enunciated the standards which should be used in applying the principle of collateral estoppel:

> ... the rule of collateral estoppel is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior

> proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Ashe v. Swenson, 397 U.S. at 443-4. Subsequently, the Second Circuit held that "in reviewing the earlier trial to determine the jury's basis for the acquittal, a court should not strain to dream up hypertechnical and unrealistic grounds on which the previous verdict might conceivably have rested." *United States v. Jacobson*, 547 F.2d 21, 23 (2d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

In the case at hand, the Connecticut Supreme Court failed to follow the mandate of the this Court; instead, it applied collateral estoppel in a hypertechnical manner. If the rule of collateral estoppel is applied with realism and rationality to the instant case, the jury's verdict of acquittal on the murder charge necessarily determined an essential element of the conspiracy to commit murder charge in the cross-petitioner's favor, and consequently, the retrial should be barred.

A. The Connecticut Supreme Court Erred In Rejecting The Claim That The Jury Necessarily Determined By Its Acquittal On The Murder Count That The Cross-Petitioner Lacked The Specific Intent To Murder Her Mother Between July 14, 1987 And August 5, 1987.

The jury could not have acquitted the cross-petitioner on the charge of murder, yet still, rationally and reasonably, have found that she had the specific intent that her mother be murdered. The cross-petitioner admitted to engaging in conduct which the court instructed the jury it could consider in determining whether the State proved the actus reus element of the crime, and therefore, viewing the evidence in a realistic and rational manner, the jury had to have found that the cross-petitioner lacked the intent to murder when she engaged in that conduct.

In its charge to the jury on the element of whether the cross-petitioner did any of the requisite acts charged in the murder count, the trial court charged the jury that it could consider, *inter alia*, the fact that the cross-petitioner called Coleman on August 4, 1987 and told him that her mother would be coming home alone, and that she later called him back and related to him the contents of a telephone conversation she had with her mother in which her mother told the cross-petitioner that she was tired and going to bed. *See* Cross-Petitioner's Appendix at 4A.

The Connecticut Supreme Court rejected this interpretation of the evidence and concluded that the jury could have determined that when the cross-petitioner told Coleman that her mother was home alone, she did not know that this information would aid him in the

commission of the murder. *Aparo*, 223 Conn. at 403 (Pet. App. 20A). The court stated:

> Although the defendant concededly told Coleman that her mother was home on the night of the murder, the jury could reasonably have found, on the basis of either Coleman's or the defendant's testimony, that although she may have wanted to kill her mother, she did not make *this* statement with the intention that it result in her mother's death. According to the defendant, the reason she told Coleman that her mother was home was to indicate that it would no longer be necessary for him to go to the house to feed the cats. Coleman testified that the defendant had told him, during their first conversation on August 4, either that her mother was home alone or that her mother was coming home. At the time of that conversation, according to Coleman, the defendant's plan was for her mother to be killed the following night. By that time, the information that Joyce Aparo was home alone on August 4 would obviously have become too stale to be useful in the commission of the crime. Only in a later conversation did the defendant change the plan and ask him to kill her mother that night. Thus, even if the jury believed Coleman's account, it might have concluded that at the time the defendant told him her mother was or would be home alone, she did not know that this information would aid him in the commission of the murder.

Aparo, 223 Conn. at 403 (Pet. App. 20A). However, such an interpretation of the evidence defies the principles of

collateral estoppel analysis. The cross-petitioner admitted that she supplied Coleman with the information that was critical to the commission of the murder: that her mother was home alone at the condominium in Glastonbury and that she was asleep. She admitted to an act which if the jury had found she did with the intent to murder, it rationally would have convicted her of murder based upon a realistic review of the evidence in this case. *See* summary of the evidence contained in *Aparo*, 223 Conn. at 393- 401 (Pet. App. 10A-18A).

The court further speculated that, "[g]iven the numerous conflicts between the defendant's and Coleman's testimony, the jury could have chosen to believe all or part of the latter." However, such an interpretation is inapposite to this Court's edict that "[t]he inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S. at 444.

Therefore, in viewing the entire record with realism and rationality, the jury necessarily determined that when the cross-petitioner informed Coleman of her mother's whereabouts and activities on the night of the murder, she lacked the specific intent to commit murder.

B. The Connecticut Supreme Court Erred In Rejecting The Claim That The Jury Necessarily Determined By Its Acquittal On The Murder Count That The Cross-Petitioner Did Not Agree With Coleman To Murder Joyce Aparo.

As an alternative argument, the cross-petitioner claimed that even if the jury determined that she had the specific intent to murder but that she did not do any of the acts

alleged and charged by the court, the principle of collateral estoppel would still bar a retrial. If the jury acquitted the cross-petitioner of murder on the basis that she possessed the intent to murder her mother between July 14, 1987 and August 5, 1987, but that she did not do any of the acts alleged or charged,[6] then based upon the record in this case, the jury necessarily determined that she never agreed with Coleman during that time period to commit murder.

The cross-petitioner argued that the trial court's instruction on the murder count amounted to a conspiracy charge because it instructed the jury that it could convict her of murder if it found that she intended to join with Coleman.[7] In effect, the charge collapsed the distinction between the accessory statute and the conspiracy statute since the ordinary meaning of "join" is "agree". *Aparo*, at 401 n.6 (Pet. App. 18A). Therefore, under the cross-

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[6] Namely, that she did not solicit, request, importune, intentionally aid, assist or join Coleman in the murder of her mother.

[7] On the elements of the accessory to murder count, the trial court charged as follows:

> There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother.

See Cross-Petitioner's Appendix 3A.

petitioner's argument, since the jury rejected the element of "intend to join" by its acquittal on the murder count, the State should be barred from a retrial because it is an element that the State will have to prove at the retrial.[8]

The Connecticut Supreme Court also rejected this claim, stating that the jury instruction "clearly separate[d] the question of the defendant's intent to join Coleman from that of whether she solicited, requested, commanded, importuned, or intentionally aided Coleman to commit murder. The jury was not told that its resolution of the former question would answer the latter as well." *Id.*, at 402 n.6 (Pet. App. 19A).

However, it is the cross-petitioner's position that under the trial court's charge, there is no distinction between the second and third element: element two required the state to prove that the cross-petitioner "intentionally aid" and element three required the state to prove that the cross-petitioner "intended to aid, assist or join." Thus, viewing the charge in a rational and realistic manner in accordance

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[8] At a retrial on the conspiracy charge, the State will have to prove three elements beyond a reasonable doubt: (1) that there was an agreement between the cross-petitioner and Coleman to commit murder; (2) that the cross-petitioner and Coleman intended that Coleman murder Joyce Aparo; and, (3) that Coleman committed the murder of Joyce Aparo in furtherance of the conspiracy. *See* Conn. Gen. Stat. §§ 53a-48(a) and 53a-54a(a); *State v. Grullon*, 212 Conn. 195, 199-203, 562 A.2d 481 (1989). Conspiracy is a specific intent crime, with the intent requirement divided into two elements. *State v. Beccia*, 199 Conn. 1, 4, 505 A.2d 683 (1986). In the case at bar, the State will have to prove not only that the cross-petitioner intended for Coleman to kill her mother but also that she intended to agree that Coleman would kill her mother.

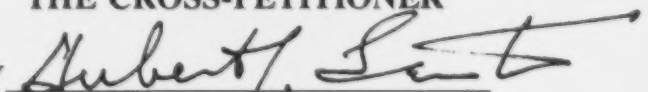
with *Ashe v. Swenson*, 397 U.S. 446 (1970), there were two elements that the jury had to find beyond a reasonable doubt: (1) that between July 14, 1987 and August 5, 1987, the cross-petitioner intended to cause the death of her mother; (2) with that intent, she solicited, requested, importuned or intentionally aided, assisted or joined Dennis Coleman to cause her mother's death between July 14, 1987 and August 5, 1987.

Thus, if this Connecticut Supreme Court's analysis is followed, that is, that the jury could have found that cross-petitioner had the intent to murder, but that she did not perform the actus reus element of the offense, then the jury had to have rejected that she intended to join with Coleman. Consequently, since the state will have to prove that the cross-petitioner intended to agree to murder Joyce Aparo in the retrial, and since that element has already been determined in favor of the cross-petitioner, collateral estoppel bars a retrial.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari to the Connecticut Supreme Court should be granted.

THE CROSS-PETITIONER

BY 

HUBERT J. SANTOS
A Member of the Bar of
the Supreme Court of the
United States

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ON PETITION FOR WRIT OF CERTIORARI TO
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APPENDICES TO CROSS PETITION

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Transcript of Jury Charge
Regarding Conspiracy Charge
From Transcript Dated
June 18, 1990 . . . . . 3A-5A

No. 53529	: SUPERIOR COURT
STATE OF CONNECTICUT	: HARTFORD/NEW BRITAIN JUDICIAL DISTRICT at HARTFORD
v.	
KARIN E. APARO	: SEPTEMBER 29, 1987

INFORMATION

COUNT ONE

James E. Thomas, Assistant State's Attorney for the Judicial District of Hartford/New Britain accuses Karin E. Aparo of Glastonbury of the crime of MURDER, in violation of Connecticut General Statutes Sections 53a-54a(a) and 53a-8, and charges that at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with the intent to cause the death of Joyce Aparo the defendant solicited, requested, importuned and intentionally aided Dennis Coleman to intentionally cause the death of Joyce Aparo on or about August 5, 1987 at approximately 1:56 A.M. at or near 3 Butternut Drive, Glastonbury, Connecticut.

COUNT TWO

And the said Attorney further accuses said defendant of the crime of CONSPIRACY TO COMMIT MURDER, in violation of Connecticut General Statutes Sections 53a-48 and 53a-54a(a), and charges that:

a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and

b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

Transcript of Jury Charge, June 18, 1990
Beginning at page 30.

There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother.

As to the first element, I have already defined intent. So as to the first element, that the defendant intended to cause the death of her mother, you may consider the nature of the -- the nature of the evidence to consider here would be the testimony of Dennis Coleman and the testimony of the defendant, and, of course, you recall the testimony of Dennis Coleman that there was a begging of him to cause the death of the defendant's mother, and the defendant's testimony concerning her denial of it.

Now, also, you may consider the various interpretations of the letters that have been put into evidence. Likewise, you may consider Dennis Coleman and the defendant's testimony concerning the nature of the subject matter during the various telephone calls. You may also consider in this connection the testimony of Shannon Dubois as to the conversation she had with the defendant and with Dennis Coleman on August 6,

1987. You may consider the admission of the defendant to Jill Smith, which she testified occurred in February of 1988, and the testimony of Dr. Cegalis and Dr. Borden in explanation of the conduct of the defendant through the period from the summer of 1986 through and after the death of her mother on August 5th.

As to the second element, you'll note that the words are in alternative, so the State does not have to prove each of them, because one would be sufficient to determine the element, and that is, with the intent to cause her mother's death, did she solicit, request, command, importune or intentionally aid Dennis Coleman to cause her mother's death. So, as I say, those are the alternative. Any one particular act would be sufficient, if you found it beyond a reasonable doubt, to find that element.

Besides the evidence you would be considering for the first element, you would consider for the second as well -- you should consider the testimony of Dennis Coleman that on Thursday before the defendant's trip to Rowayton, and then onto Binghamton, that at her window, crying, she begged him to kill her mother so she wouldn't have to go; that on August 4th, in a phone conversation, she said her mother would be coming home alone, and that she did not come home because she did not want to be present when the act of killing occurred, but would be -- would be by in the morning to clean up, and that after a call from her mother that she was tired and was going to bed, she called Dennis back and told him she -- her mother was tired and going to bed; and

the defendant's testimony that she lied to Dennis about not wanting to go to Binghamton, and that she was looking forward to it, and her relationship with her mother had improved, and she denied asking him to kill her mother.

As to the third element, acting with the above intention, did she aid, assist or join in the commission of the murder of her mother, as to this element, the testimony of Dennis Coleman that he intentionally caused the death of Joyce Aparo, along with the evidence you considered as to the first and second element.

If you find that the State has proved each of these elements to you beyond a reasonable doubt, then you have found the defendant guilty of the first count of accessory to murder. And, again, the elements are: First, that the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother. On the other hand, if you find that the State has failed to prove any one of these elements to you beyond a reasonable doubt, you must find the defendant not guilty.

(2) 92-1308

No. 92-1067 (4)

Supreme Court, U.S.
FILED
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In The

Supreme Court Of The United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner,

v.

KARIN APARO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. **Did the Connecticut Supreme Court correctly hold that the Double Jeopardy Clause does not bar retrial of the conspiracy count, where the jury at the first trial deadlocked seven to five for acquittal on that count?**

II. **Did the Connecticut Supreme Court correctly conclude that the doctrine of collateral estoppel does not bar retrial, because the cross-petitioner failed to demonstrate that the jury, in acquitting her on the murder count, had actually decided an element of the conspiracy count in her favor?**

TABLE OF AUTHORITIES

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in relevant part):

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . .

Constitution of the United States, Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 53a-8:

Criminal liability for acts of another. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Connecticut General Statutes Section 53a-48(a):

Conspiracy. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes Section 53a-54a(a):

Murder. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception' except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF THE CASE

The cross-respondent hereby adopts and incorporates the Statement of the Case set forth in the state's Petition for Certiorari at pages 7-11.

REASONS FOR DENIAL OF THE CROSS-PETITION

I. The Cross-Petition Cites No Precedent Or Relevant Authority For The Contention That The Double Jeopardy Clause Bars Retrial Of The Conspiracy Count Where The Twelve-Member Jury Deadlocked Seven To Five In Favor Of Acquittal On The Mistried Count

The cross-petitioner elected to be tried before a jury of twelve. She now contends that because she had initially had a statutory right to have the conspiracy count tried to a six person jury, and six persons on the deadlocked jury voted for acquittal, retrial is precluded by the double jeopardy protection against a second prosecution for the same crime.[1]

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[1] In her cross-petition to this Court the cross-petitioner raises for the first time a due process ground for this claim. This case was before the Connecticut Supreme Court on an interlocutory appeal (continued...)

The Connecticut Supreme Court rejected this claim, noting that, pursuant to Connecticut's statutory scheme on jury trials, "had the defendant preferred a jury of six, she could have so elected." *State v. Aparo*, 223 Conn. at 388. The state supreme court also concluded that, in light of "settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous" the vote tally of the deadlocked jury was "legally irrelevant." *State v. Aparo*, 223 Conn. at 388.[2] The cross-petitioner has not demonstrated that the state court's pronouncements on state law violate the federal constitution or otherwise raise any federal question.

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[1](...continued)
challenging on double jeopardy grounds the denial of a motion to dismiss. Because the due process ground was neither raised or decided in the Connecticut Supreme Court, it is not properly before this Court and should not be reviewed. Illinois v. Gates, 462 U.S. 213, 218 (1983)(only in exceptional cases arising in federal courts will this Court consider claims not pressed or passed upon below).

[2] The state supreme court also recognized that this claim could not be addressed without rank speculation regarding the composition of a six person jury had the cross-petitioner so chosen that number of jurors for her jury trial. *State v. Aparo*, 223 Conn. at 388.

The cross-petitioner fails to point to any precedent for her contention that retrial after deadlock is constitutionally barred by the double jeopardy clause. She proffers, as sole support for her claim, *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), which is factually and legally inapposite. The cross-petitioner contends that that case stands for the proposition that an acquittal can arise from a situation other than a unanimous jury verdict. In *Martin Linen Supply Co.*, the trial court granted the defendant's motion for a judgment of acquittal after the jury had deadlocked. Thus a final judgment of acquittal was entered and the government was precluded from taking an appeal.

By contrast, the trial court in the instant case declared a mistrial on the deadlocked conspiracy count. *State v. Aparo*, 223 Conn.384,386 (1992); Appendix To Petition at 3A. As a result, no final judgment of acquittal was ever entered on that count, and jeopardy has not yet terminated on the conspiracy charge. *Richardson v. United States*, 468 U.S. 317 (1984). Thus the deadlock in this case bears no similarity to the judgment of acquittal in

II. The Connecticut Supreme Court's Conclusion That The Cross-Petitioner Failed To Show That The Jury Actually Decided An Element Of The Conspiracy Count In Her Favor Is Fact-Bound And Does Not Raise A Substantial Federal Question

The cross-petitioner contends that the Connecticut Supreme Court erred in rejecting her claim that the jury, by acquitting her of murder, necessarily decided elements of the mistried conspiracy count in her favor. *See Dowling v. United States*, 493 U.S. 342, 350 (1990)(defendant bears burden of showing that issue was actually decided in her favor); *United States v. DeVincent*, 632 F.2d 155, 158-59 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) (defendant did not show that acquittal on first count involved determination of any element of second mistried count). In considering the cross-petitioner's claim, the Connecticut Supreme Court was fully cognizant that the collateral estoppel doctrine is not to be applied in a "technically restrictive manner." *State v. Aparo*, 223 Conn. at 390; Appendix To Petition at 7A. There is

nothing to substantiate the cross-petitioner's contention that the state court acted in an unreasonable or irrational manner in applying the collateral estoppel doctrine.

A court's inquiry into what the first jury actually determined is necessarily fact-bound and may require a painstaking review of all of the record. Here the trial court, in denying the motion to dismiss, performed a careful analysis of the evidence at the first trial, and the Connecticut Supreme Court in reviewing that ruling did the same. 223 Conn. at 393-401; Appendix To Petition at 10A-18A. In asking this Court to perform the same evidentiary review already performed by the state courts, the cross-petitioner misperceives the nature of the writ. This Court "does not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.).

Additionally, the cross-petitioner has failed to raise a substantial federal question. The state courts' conclusion that the first jury did not actually decide an element of the mistried conspiracy count in the defendant's favor has little or no significance outside the

circumstances of this case.[3]

The cross-petitioner also contends that the trial court's jury instructions "collapsed the distinction between the accessory statute and the conspiracy statute." Cross-Petition at 19. The state supreme court rejected her interpretation of the statutory and instructional language involved. *State v. Aparo*, 223 Conn. at 401-2 n.61; Appendix To Petition at 18A-19A.[4] The cross-petitioner

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[3] Moreover, as the state argued below, if the jury in acquitting the cross-petitioner on the murder count had unanimously agreed that she lacked the specific intent to kill, they would have acquitted her not only of murder, but also of conspiracy to commit murder, which contained the element of intent to kill. *See*, *State v. Aparo*, 223 Conn. at 401-2; Appendix To Petition at 18A-19A (explaining elements of the crimes charged). The fact that some jurors voted for conviction on the conspiracy count refutes the cross-petitioner's claim that the jury actually concluded that she lacked the intent to kill her mother when they unanimously acquitted her of murder.

[4] The Connecticut Supreme Court held that the challenged instruction, when considered in context, "did not permit the jury to substitute a conspiracy for [the accessorial] acts[,]" nor did it equate "intent to join" with any accessorial act, or with the conspiratorial act of entering into an agreement. *State v. Aparo*, 223 Conn. at 401-2 n.6; Appendix To Petition at 18A-19A. The state supreme court expressly found that the challenged instruction "did not weaken the

(continued...)

is merely asking this Court to delve into the idiosyncracies of a state trial court's jury charge. Such a claim is not constitutional in nature and is not worthy of this Court's certiorari jurisdiction.

RESPECTFULLY SUBMITTED,

STATE OF CONNECTICUT

CROSS-RESPONDENT

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February, 1993

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[4](...continued)
state's burden of proving accessorial acts and did not permit the jury to substitute a conspiracy for such acts." *Id.*